

OCT 24 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

RICHARD CANNIFF MESCE,

Petitioner - Appellant,

v.

CHERYL PLILER, WARDEN; C. A.
TERHUNE, Director of the CDC,

Respondents - Appellees.

No. 02-16345

D.C. No. CV-98-20500-JF

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeremy Fogel, District Judge, Presiding

Argued and Submitted October 10, 2003
San Francisco, California

Before: CUDAHY**, BEEZER, and KLEINFELD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

We need not decide whether prohibition of firearms possession for misdemeanants convicted before the prohibition constitutes a violation of the prohibition against Ex Post Facto laws contained in the United States Constitution. Under the Anti-Terrorism and Effective Death Penalty Act of 1996, we decide only whether the California Court of Appeal decision¹ was contrary to or an unreasonable application of clearly established federal law as set out by the Supreme Court.² Mesce cites no Supreme Court decision with materially similar facts to which the state decision was “contrary.” The California Court of Appeal not unreasonably held that Weaver v. Graham³ would not make Mesce’s conviction an ex post facto violation because he possessed the gun after the law criminalizing possession was passed, and that law did not add to his punishment for misdemeanor assault but, rather, under California Department of Corrections v.

¹ Because it is the last reasoned decision, we look to the California Court of Appeal’s decision as the basis for the state court’s judgment that the California Penal Code Section 12021(c) does not constitute an ex post facto law. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991)).

² 28 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003).

³ 450 U.S. 24, 29 (1980).

Morales,⁴ merely identified a class subject to prospective regulation because of an established propensity for violence in the past.

AFFIRMED.

⁴ 514 U.S. 499, 506-507 n.3 (1995).